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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RUFUS FAULCON,

Defendant and Appellant.

D055620

(Super. Ct. No. SCD219933)

APPEAL from a judgment of the Superior Court of San Diego County, Margie G. Woods, Judge. Affirmed in part; reversed in part and remanded with directions.

A jury found Rufus Falcon guilty of possessing a controlled substance (Health & Saf. Code, § 11350, subd. (a)). Falcon waived his right to a jury trial on allegations of three prior prison terms (Pen. Code, § 667.5)¹ and two strikes (§ 667 subds. (b)-(i)), and admitted the allegations. The court dismissed the strikes and sentenced him to five years

¹ All further statutory references are to the Penal Code.

in prison: the two-year middle term and one year for each prison prior. Faulcon appeals. We remand with directions to determine the correct number of credits.

BACKGROUND

On April 3, 2009, police officers heard extremely loud music coming from a parked car. The officers approached and saw Faulcon sitting in the driver's seat. An odor of burning marijuana emanated from the car's interior. One of the officers searched the car. He found a half-smoked marijuana cigarette in an open ashtray and approximately one ounce of marijuana in a clear sandwich bag in the center console. In the trunk was a backpack containing an unlabeled pill bottle. The bottle contained 53 and one-half oxycodone pills.

Faulcon was in custody from April 3, 2009, through sentencing on July 30, a total of 119 days. According to the abstract of judgment, the court gave him credit for 119 days, plus 58 days' section 4019 credits. However, it appears from the reporter's transcript, as explained below, that the court may have awarded no credits.

Faulcon was on parole when he was arrested for the instant offense on April 3, 2009. When he was arrested, he possessed credit cards in addition to the marijuana and oxycodone. Possessing the drugs and credit cards were parole violations. A parole hold ensued. According to defense counsel and the probation officer, Faulcon signed an "optional waiver" for 12 months with half time, retroactive to April 3. That is, he agreed to a 12-month parole revocation term and waived his right to a parole revocation hearing but retained the right to request a hearing within a certain period after sentencing in this case. (Cal. Code Regs., tit. 15, § 2641, subd. (b).) The probation

report stated that pursuant to *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), Faulcon was not entitled to credits in this case because he had "an active parole hold as of [April 3], and received a term from the Parole Board for violations other than the instant offense on [April 14], which was retroactive to the arrest date of [April 3]."

At sentencing, defense counsel stated that all parole violations except the credit card possession stemmed from the arrest in this case and Faulcon was going to request a revocation hearing on the credit card issue. Counsel argued Faulcon should be given custody credits because the parole board might find possessing the credit cards was not a violation, and the board could deny custody credits if it reached the opposite conclusion. A discussion ensued concerning whether the court should award no credits and make an adjustment later if Faulcon prevailed at the parole hearing, or whether it should award credits and leave it to prison officials to deny credits if Faulcon did not prevail. The court's conclusion is not clear, but it appears from the reporter's transcript that the court chose the former option.

DISCUSSION

Appointed appellate counsel filed a brief summarizing the facts and proceedings below. Counsel presented no argument for reversal, but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738.

We requested letter briefs from both counsel discussing whether the abstract of judgment correctly reflects the court's ruling on custody credits. Both counsel responded.

Respondent argued the trial court acknowledged that *Bruner* applied, but "then awarded 199^[2] days of actual custody and 58 days of presentence credit, for a total award of 177 credits." Respondent concluded that since Faulcon could not show the parole hold resulted solely from his arrest in this case, he was not entitled to any credit.

The letter brief of appellant's counsel included as exhibits a declaration of counsel and a stipulation to adjust credits and an order on the stipulation. The declaration states that on April 9, 2010, trial counsel said that after sentencing, Faulcon was deemed in violation of parole only for his conduct in this case and all other allegations were dismissed, and that trial counsel and the deputy district attorney signed a stipulation to adjust credits to 177. In the letter brief, appellant's counsel argued *Bruner* did not apply; the court correctly awarded 177 credits; but the recent amendment to section 4019 entitles Faulcon to 238 credits.³

We deemed appellant's letter brief to include a request for judicial notice of the stipulation and order and invited respondent to file a response to the request for judicial notice and to the section 4019 argument. Respondent objected to this court taking judicial notice of the stipulation and asked that the case be remanded to the trial court to address the credits issues.

² This appears to be a typographical error. We assume respondent meant 119.

³ In January 2010, the legislature amended section 4019 to increase presentence conduct credits in some cases.

We agree the case should be remanded. The *Bruner* issue is fact driven and more appropriately decided by the trial court. Any issues relating to the amendment of section 4019 are not ripe.

We granted Faulcon permission to file a brief on his own behalf. He has not responded. A review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738 has disclosed no reasonably arguable appellate issues. Faulcon has been competently represented by counsel on this appeal.

DISPOSITION

The award of credits is reversed. The case is remanded to the trial court for a determination of the correct number of credits, and, if necessary, amendment of the abstract of judgment and forwarding of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.